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Court of Appeals
Division III
State of Washington

No. 29817-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANDREW ROBERT MCCLURE,
Defendant/Appellant.

APPEAL FROM THE LINCOLN COUNTY SUPERIOR COURT
Honorable John F. Strohmaier

5
BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....2

 1. The sentencing court did not have the statutory authority to impose a sentence of community custody of 36 months where only 18 months is authorized for the offense under RCW 9.94A.701, the statute authorizing community custody.....2

 2. The sentencing court violated due process and exceeded its statutory authority by imposing a certain condition of community custody that is neither authorized by statute nor crime-related.....4

D. CONCLUSION.....5

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Cockle v. Dep't of Labor & Indus.</u> , 142 Wn.2d 801, 16 P.3d 583 (2001)...	3
<u>In re Personal Restraint of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	3
<u>State v. Ammons</u> , 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986)....	2
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	4
<u>State v. Blight</u> , 89 Wn.2d 38, 569 P.2d 1129 (1977).....	4

<u>State v. Bryan</u> , 93 Wn.2d 177, 606 P.2d 1228 (1980).....	2
<u>State v. Crockett</u> , 118 Wn. App. 853, 78 P.3d 658 (2003).....	4
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	4
<u>State v. Monday</u> , 85 Wn.2d 906, 540 P.2d 416 (1975).....	2
<u>State v. Mulcare</u> , 189 Wn. 625, 66 P.2d 360 (1937).....	2
<u>State v. Paine</u> , 69 Wn. App. 873, 850 P.2d 1369, <i>rev. denied</i> , 122 Wn.2d 1024 (1993).....	4
<u>State v. Riley</u> , 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).....	4

Statutes

RCW 9.41.040.....	4
RCW 9.94A.030 (45).....	3
RCW 9.94A.030 (54).....	3
RCW 9.94A.701.....	1, 2, 3
RCW 9.94A.701 (1).....	3
RCW 9.94A.701 (2).....	3
RCW 9A.56.200 (2).....	3

A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing community custody of 36 months as part of the sentence.

2. The trial court erred in imposing a certain condition of community custody as part of the sentence.

Issues Pertaining to Assignments of Error

1. Does a sentencing court lack statutory authority to impose a sentence of community custody of 36 months where only 18 months is authorized for the offense under RCW 9.94A.701, the statute authorizing community custody?

2. Does a sentencing court exceed its statutory authority by imposing a certain condition of community custody that is neither authorized by statute nor crime-related?

B. STATEMENT OF THE CASE

Following a bench trial the court found the defendant, Andrew Robert McClure, guilty as charged of residential burglary and first degree robbery. CP 38, 48. The court imposed terms of confinement of nine months and 31 months respectively, to be served concurrently, and a 36-month term of community custody on the robbery conviction. CP 51.

The court in part imposed the following condition of community custody:

(6) [That the defendant shall] not own, use, or possess firearms or ammunition;

...

CP 52, ¶ 4.2(B) (6). This appeal followed. CP 62.

C. ARGUMENT

1. The sentencing court did not have the statutory authority to impose a sentence of community custody of 36 months where only 18 months is authorized for the offense under RCW 9.94A.701, the statute authorizing community custody.

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). Statutory

construction is a question of law and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

...
(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.
...

RCW 9.94A.701 (2).

Under the Sentencing Reform Act, “serious violent offenses” are subject to a community custody term of three years. RCW 9.94A.701 (1). But “violent offenses” are subject only to 18 months of community custody. RCW 9.94A.701 (2). First degree robbery is a class A felony. RCW 9A.56.200 (2). A class A felony is a “violent offense.” RCW 9.94A.030 (54). It is not a “serious violent offense.” RCW 9.94A.030 (45).

“A trial court only possesses the power to impose sentences provided by law.” In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Here, the trial court imposed a term of community

custody beyond its authority. The judgment and sentence must be corrected.

2. The sentencing court violated due process and exceeded its statutory authority by imposing a certain condition of community custody that is neither authorized by statute nor crime-related.

A trial court's sentencing authority is limited to that granted by statute. State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996) (citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, *rev. denied*, 122 Wn.2d 1024 (1993)). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Sentencing conditions are reviewed for abuse of discretion. State v. Crockett, 118 Wn. App. 853, 856, 78 P.3d 658 (2003); *see* State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). A crime-related prohibition will be reversed if it is manifestly unreasonable. Riley, 121 Wn.2d at 37 (quoting State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

The legislature has determined that a convicted felon may not own, possess or have in his control a firearm. RCW 9.41.040. Here, the court ordered that Mr. McClure “not own, use, or possess firearms or

ammunition”. CP 52, ¶ 4.2(B) (6). Since the legislature has not included ammunition in its prohibition, the imposition of a broader restriction is authorized only if it is crime-related. But there was no evidence that ownership, use or possession of ammunition had anything to do with the underlying burglary and robbery convictions. This portion of the condition is not authorized by statute or reasonably related to the circumstances of the crimes of conviction, and the provision should be stricken.

D. CONCLUSION

For the reasons stated, this Court should remand the matter for resentencing.

Respectfully submitted on November 28, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 28, 2011, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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